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American Council of Chief Defenders Statement on Caseloads and Workloads

Introduction

Excessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This can mean that innocent people are wrongfully convicted, or that persons who are not dangerous and who need treatment, languish in prison at great cost to society. It can also lead to the public's loss of confidence in the ability of our courts to provide equal justice.^[1]

The American Council of Chief Defenders (ACCD) believes that the challenges posed by excessive workload are significant. It has reviewed a variety of caseload standards adopted by defenders and bar associations across the country. While there is considerable variety in prosecution and court practices from state to state, and even within states, defenders have found the National Advisory Commission on Criminal Justice Standards ("NAC standards") to be resilient and to provide a foundation from which local defenders and bar association leaders can develop local caseload standards.

The National Advisory Commission on Criminal Justice Standards and Goals issued a report in 1973 that included a number of suggestions to improve public defense services, and recommended caseloads limits for public defenders. Standard 13.12 Workload of Public Defenders provides in pertinent part as follows:

The caseload of a public defender office should not exceed the following:

felonies per attorney per year: not more than 150;
misdemeanors (excluding traffic) per attorney per year: not more than 400;
juvenile court [delinquency] cases per attorney per year: not more than 200;
Mental Health Act cases per attorney per year: not more than 200; and
appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.

A number of state standards, as well as recent ethics opinions from both the ACCD and the American Bar Association, accept the NAC standards and go on to require that when a defender organization's ability to provide effective representation is threatened by excessive caseloads, the leadership of the office must act to obtain funding to increase staffing or to decline new cases.

Numerous Factors Affect Quality of Representation and Maximum Caseloads

The number and types of cases for which an attorney is responsible may affect the quality of representation individual clients receive. FN While there are many variables to consider in evaluating attorney workloads, including the seriousness and complexity of assigned cases and the skill and experience of individual attorneys, due process and the right to counsel require that an attorney not be assigned more cases than he or she can effectively handle.

Numerical caseload limits can be affected by many variables including the specific policies and procedures within a local jurisdiction. For example, a prosecutor's office which consistently overcharges, or one which refuses to plea bargain, can add substantially to attorney workload by increasing the necessity and frequency of motions litigation and, ultimately, the number of cases that go to trial.

Footnote:

Some jurisdictions count charges as equivalent to cases, so, for example, a three-count case with one client charged with three offenses on the same day would be counted as three cases. In such situations, maximum caseload limits should be adjusted accordingly, consistent with the principles of effective representation. accepted

Allocation of resources in law enforcement and prosecutors' offices, including for example, increased staff funded by grants, and establishment of "cold case" prosecutor units, can result in increased workload for defenders.

Local court calendar management practices, such as a court congestion relief project, can also play havoc with attorney workloads as can legislative changes and new judicial decisions. What may appear to be a relatively small number of cases can actually represent an unreasonable workload depending on various state and local policies and procedures.

In General, Caseloads Should Not Exceed the NAC Limits [questions]

The ACCD believes that, in general, defender caseloads should not exceed the limits recommended by the NAC. These numerical standards have proved resilient over the past 34 years because they have been found to be consistent with manageable caseloads in a wide variety of public defender offices in which performance was favorably assessed against nationally recognized standards, such as NLADA's *Performance Guidelines for Criminal Defense Representation*. (Also see: "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems" [American Council of Chief Defenders National Juvenile Defender Center 2004]; and the "Ten Principles of a Public Defense Delivery System" [American Bar Association (2002)]).

Local Practice Should Be Considered in Determining Caseload Limits

Notwithstanding their general suitability, the NAC standards should be carefully evaluated by individual public defense organizations, and consideration should be given to adjusting the caseload limits to account for the many variables which can affect local practice. The NAC standards, for example, weight all felonies the same, regardless of seriousness, and similarly all misdemeanors the same, regardless of the widely varying amounts of work required for different types of cases and dispositions. Similarly, the NAC standards do not account for differences in urban and rural jurisdictions, and instances where attorneys must travel significant distances to and between courts, confinement facilities and clients. Such factors significantly affect the number of cases in which effective representation may be given. Because a numerical caseload does not equate to a universal workload from jurisdiction to jurisdiction, the ACCD and the NLADA recognize that there is value in utilizing case-weighting studies for individual jurisdictions so long as such studies are implemented in a manner which is consistent with accepted performance standards. [See *Case Weighting Systems: A Handbook for Budget Preparation* NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001); and *The State Bar of California Guidelines on Indigent Defense Services Delivery Systems* (2006), Workload, p. 24].

Because there are exceptional cases, and categories of cases that require unusual investment of resources, a useful approach to determining maximum workload and to providing adequate resources for defenders is a case credit system.^[2] Under such a system, defenders receive additional case credit, or resources, for cases that require significantly more attorney time than the average. A homicide case, or a sex offender case that could result in a life sentence, or a case involving new uses of scientific evidence, would receive additional resources based on the amount of attorney time required. It is incontestable that an attorney who handles only homicide cases cannot represent effectively as many clients in a year as one who handles only "lower level" felonies, such as burglary or car theft or minor assaults, that normally have a limited number of witnesses, less complex fact patterns, and limited or no scientific evidence.

Case credit systems can be developed to take into account the need for additional resources for more complex cases.

While the NAC caseload limits remain the standard, there are limited circumstances in which exceptions upward may be acceptable because particular changes in criminal policy and practice, adopted since the NAC Standards were established, have resulted in the ability of defenders to handle an increased number of certain classes of cases. The courts in some jurisdictions have developed and adopted policies and programs that favor diversion for a significant number of non-violent offenders, and some of these are able to place such clients with the appropriate community-based service provider.

Many jurisdictions have implemented treatment-oriented courts and other programs that provide alternatives to traditional prosecution and punishment. These programs can reduce recidivism and save criminal justice system costs. They also require significant investment of defender time and resources that should be considered in determining appropriate workloads. For example, mental health treatment courts and domestic violence courts require numerous court hearings and monitoring of clients' compliance with court orders.

Contracts for indigent defense services should include a provision to assure the right of the defender organization to seek modification or cancellation of the contract when unforeseen changes in local practices occur. Quality representation must be protected, and jurisdictions must avoid creating financial disincentives to proper representation.

Despite Improvements in Technology, Core Elements of Representation Have Not Changed

The core elements of effective representation have not changed. The National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation (1997), http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines, require that defenders communicate with their clients, investigate their cases, conduct appropriate motions practice, negotiate with the prosecutor, prepare and conduct trials and sentencings, and preserve the client's right to appeal.

The addition of electronic legal research and modern computer equipment and communications has increased efficiency and reduced the time it takes to prepare complex legal motions and memoranda. It should be noted however, that efficiencies associated with computer technology have sometimes been offset by the tendency of courts to provide attorneys with less time to produce legal pleadings; and, in some locations, the availability of computers has resulted in a decrease in the funding available to hire support staff.

In Many Jurisdictions, Caseload Limits Should Be Lower Than the NAC Standards

In many jurisdictions, maximum caseload levels should be lower than those suggested by the NAC. Public defense practice has become far more complex since the NAC standards were established in 1973. For example, developments in forensic evidence over the last 30 years now require significant expenditure of time by attorneys to understand, defend against, and present scientific evidence and the testimony of expert witnesses. New and severe sentencing schemes have developed, resulting in many mandatory minimum sentences, more life-in-prison sentences, and complex sentencing practices that require significant legal and factual research and time to prepare and present sentencing recommendations. Defenders must research and explain to their clients the possible consequences of pleas or convictions at trial of different charges. When alternative sentences are possible, including "exceptional" sentences below the standard range established in a statute, defense counsel must prepare thoroughly to advocate for such sentences, normally including preparation of pre-sentence memoranda for the court to consider, and occasionally using forensic experts or other witnesses. Often, defense counsel will need to research and to challenge the applicability of prior convictions in determining what a standard range sentence would be.

The increase in sanctions is reflected in the fact that the number of people in prison and jails increased more than 600% between 1977 and 2005. The prosecution of people charged with sex offenses has become more comprehensive, and the sentences for this category of crime have increased dramatically. In addition, the diversion of many non-violent felony cases to drug courts and mental health courts has resulted in caseloads where the remaining cases are, on average, more serious (and more likely to involve crimes of violence). In the end, these more serious caseloads require more attorney time, not less.

New, Complex Practice Areas Require More Attorney Time Per Case

The last 34 years have also seen the emergence of entire new practice areas, including sexually violent offender commitment proceedings, and persistent offender ("three strikes") cases which carry the possibility of life imprisonment. These practice areas require a significant degree of specialized knowledge and require substantial investment of attorney and support staff time. For example, a public defender attorney assigned to an office which handles sexually violent offender commitment proceedings will have to devote hundreds of hours just to become familiar with the literature regarding sexual deviance and the prediction of recidivism. These cases typically involve thousands of pages of discovery covering the client's entire life, and the jury is asked to consider psychological diagnoses and actuarial predictions of behavior. Similarly, because expert witnesses are a staple of sexually violent offender proceedings, the defender attorney working in this field must devote significant time to working with and preparing to examine expert witnesses on both sides of the case. The vast body of research and specialized knowledge in this area did not exist in 1973 when the NAC standards were formulated.

The advent of these new practice areas has made even more clear that a "felony" does not always simply require the work of one felony case. Case weighting, to assess the impact

of these complex and time-consuming cases, is important to determine the number of cases an attorney actually can handle.

Representing Juveniles Has Become More Complex and Requires More Attorney Time

The work of defenders who represent children has become increasingly complex. A public defender in the 21st century, whether representing children in dependency (abuse and neglect) proceedings, or in delinquency and youthful offender or status offender cases, must possess a sophisticated understanding of family dynamics, mental illness, and cultural difference.

The NAC standards did not address representation in dependency cases. These cases involve significant family history issues and frequent court hearings that can last for years.

Research developments in the last decade have increased scientific understanding of adolescent brain development. The notion that children are simply smaller adults is no longer accepted. Today, a lawyer representing children must devote many hours to learning about clients, distilling and applying the pertinent scientific evidence, and marshaling that evidence for presentation in court.

Some states are now prosecuting and incarcerating juvenile “status offenders,” including truants, in proceedings that were unheard of in 1973. The nature of these cases is such that the attorney for the child must spend significant time gathering and synthesizing educational, health, and psychiatric records which will bear on the appropriate resolution of the case. Moreover, the attorney’s role often continues beyond the initial court judgment in the case. For example, in some jurisdictions, the defender is obliged to monitor the progress of juvenile clients in court-ordered placements and determine whether the clients receive the services that were judicially ordered. In cases in which court-ordered services are not being provided, defense counsel must pursue additional in-court proceedings. [See, for example, California’s *Guidelines on Indigent Defense Services Delivery Systems* (2006) *supra*, Juvenile Practice, p.21.]

An equally significant post-1973 development in the representation of juveniles has been the advent of “youthful offender” prosecutions. In many jurisdictions, children who before 1973 would have been the object of a Juvenile Court’s *parens patriae* orientation, now face the possibility of being treated as adults and, ultimately, incarcerated in adult prison. This significant change to a more punitive approach toward children has greatly raised the stakes for the defender’s child client, and has led to a concomitant increase in the work required of the public defender attorney assigned to defend such cases. Consistent with the more punitive approach to juvenile delinquency, juvenile convictions are also now used to enhance adult sentences in many states.

Increases in Collateral Consequences of Convictions Have Led to the Need for More Attorney Time

There has also been a significant increase in the collateral consequences attendant to criminal convictions and juvenile adjudications, which in turn has led to a substantial increase in the work which defense attorneys are required to perform on their cases. As one professor has noted:

Society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to reconnect to the social and economic structures that would lead to full participation in society. These structural disabilities often include bars to obtaining government benefits, voting disenfranchisement, disqualification from educational grants, exclusion from certain business and professional licenses, and exclusion from public housing.

Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. Rev. 255, 258 (2004) (footnotes omitted).

When the collateral consequences of conviction are more severe, they can be more important to the clients than possible incarceration, and clients are more likely to go to trial and sentencing preparation can become more difficult and time-consuming. Defenders need to spend considerable time in developing and presenting mitigation evidence and in researching and challenging the applicability of prior convictions, which not infrequently involve convictions from other states.

Probably the most important development has come in the area of the immigration consequences of criminal convictions. Recent changes in U.S. immigration law have dramatically increased the likelihood of deportation and other negative immigration consequences for non-citizen defendants who are convicted of criminal offenses. Today's criminal defense counsel must master the intricacies of a substantial body of U.S. immigration law which did not exist in 1973.

Often, careful negotiations with the prosecutor can result in a conviction that will not result in adverse immigration consequences. In this regard, courts are requiring defense attorneys to advise their clients of immigration consequences. See, e.g., *State v. Paredes*, 136 N.M. 533, 539 (N.M. 2004) (New Mexico Supreme Court held that "criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain"). See also, *People v. Soriano*, 194 Cal. App.3d 1470, 1481 (Cal. App. 1 Dist.1987) (Philippine resident of United States was denied effective assistance of counsel in entering his guilty plea, and habeas relief was warranted, because counsel failed to advise adequately of immigration consequences of plea. The *Soriano* court noted that the public defender's office reported to the court that it "imposes on its staff attorneys, under its 'Minimum Standards of Representation,' the duty to ascertain 'what the impact of the case may have on [the client's] immigration status in this country.'")

When the NAC standards were first promulgated, there was no sex offender registry. Now a registry exists in every state. In 1973, Federal student loan eligibility was not precluded by a conviction for possession of small amounts of controlled substances. Now, such a conviction results in a loss of eligibility. In 1973, a conviction for operating a motor vehicle under the influence of alcohol did not necessarily result in a loss of license. Now, license revocation is a common result of such convictions. In some states, juveniles can lose their driver's license for being in possession of alcohol or marijuana. Additional collateral consequences which have emerged since the NAC standards were first promulgated include loss of eligibility for public housing and loss of SSI benefits.

Defense counsel needs to understand these consequences, and, if possible, help the client to avoid them by finding an alternative resolution, perhaps through a diversion program or a plea to a different charge.

Death Penalty Law Has Become More Complex

Similarly, the law relating to capital punishment has become much more complicated, and many states enacted new death penalty laws following the United States Supreme Court's decision invalidating death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972). When the NAC standards were published in 1973, it was not yet clear that reinstatement of the death penalty would both take place and survive constitutional challenge. It is clear that the NAC 150 felony case standard did not include capital cases and including capital cases in a 150 caseload would be inappropriate.

Capital defense can require thousands of attorney hours. Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards.

The provisions of the Anti-Terrorism and Effective Death Penalty Act require trial counsel to be even more comprehensive and careful in preserving issues for appellate and post-conviction review.

A case should be considered a capital case if the charge filed can lead to the death penalty until the prosecutor has declined to seek the death penalty.

Defender Performance Standards Inform Caseload and Workload Limits

The landscape of public defender practice has also undergone a profound change since 1973 in the manner in which attorneys approach their work. This change in orientation – toward increased professionalism and zealous representation – has been the result of a more sophisticated and comprehensive approach to both legal education and defender management. The promulgation of defender performance standards, as well as case law making clear what is required for effective assistance of counsel, have resulted in a greater recognition of the critical importance of thorough pretrial preparation and client-centered representation. These are changes which benefit both courts and clients, and

help to ensure that the right to counsel is real, but they are changes which lead to increased attorney hours on each case.

A “Felony” is Not Always a Felony

In a number of jurisdictions there is an additional issue regarding the applicability of the NAC standards, an issue which has existed since their promulgation in 1973. While most jurisdictions define a “felony” as being any offense which carries a potential punishment of more than one year, see Black’s Law Dictionary, 651, 1250 (8th Ed. 2004), some jurisdictions, such as Massachusetts, define felonies to include only those offenses which are punishable by incarceration in the State Prison. In Massachusetts, offenses which carry potential punishment up to as much as two and one-half years in a Jail or House of Correction are classified as “misdemeanors.” Thus, what would count as a felony in most other jurisdictions, and would be subject to a caseload limit of 150 cases, is a misdemeanor in Massachusetts and under the NAC standards would be subject to a caseload limit of 400 cases.

The NAC standards also do not address the complexity that can result when a public defender office takes only a portion of the total group of assigned counsel cases, and provides representation only in cases which involve felonies with more serious penalties. In Washington, D.C., for example, the staff attorneys of the Public Defender Service (PDS) are assigned few misdemeanors and instead concentrate primarily on cases which involve the most difficult felonies. (The majority of cases in Washington, D.C. are handled by assigned counsel from the private bar, who are trained by PDS). Thus, in this type of defender office, the NAC distinction between “felonies” and “misdemeanors” may be too broad to ensure that maximum caseload limitation levels are set appropriately. Caseloads for a defender office operating under a PDS-type structure must be lower than for those that have a more varied mix of cases.

Appeals

The fundamental requirements of appellate work, including careful review of the record, meeting with the client, discussing the case with trial counsel, research and preparation of briefs and preparing and conducting oral arguments, as affirmed in existing standards and case law, continue to support a caseload maximum of 25 non-capital cases per year.¹ Technological developments in electronic research permit greater efficiency, but

¹ The Illinois Appellate Defender in 1994 adopted a 24 unit standard.

Each assistant appellate defender with one year of service was required to complete, during each year, 24 “brief units”-a term defined as an appellate court brief in a direct appeal from a judgment entered following a criminal trial, in which the record on appeal is not less than 250 pages and not more than 500 pages. See, *U.S. ex rel. Green v. Washington*, 917 F.Supp. 1238, 1250, N.D.Ill.(1996). The Court in *Green* found “that the assignment of significantly more than 25 cases of average complexity to one attorney in a single calendar year would create an unacceptably high risk that the attorney would be unable to brief the cases competently within a reasonable period of time.”

the increase in complexity of cases at the trial level can result in increased attorney hours per case. In addition, the use of video recordings in some places in lieu of typed transcripts results in dramatically increased burdens on appellate attorneys. Jurisdiction-specific assessment of workload is as important for appellate cases as it is for trial level work.

Conclusion

The ACCD reaffirms the NAC recommended maximum caseload limits, but urges thorough assessment in each jurisdiction to determine the impact of local practices and laws on those levels, as outlined in the accompanying resolution.

The NLADA Standards for Appellate Defender Offices (1980) provide as follows:

H. Case Weighting and Staffing Ratios

1. An appellate defender office or division shall annually complete twenty-two work-units for each full-time attorney or the equivalent. In jurisdictions which require an abridgement of the testimony by the appellant, the annual workload shall be twenty (20) work-units. The number of work-units shall be determined as follows:

a. A brief-in-chief or *Anders* brief filed in a case in which the court transcripts are 500 pages or less shall be one work-unit, except as otherwise provided herein.

b. In cases in which the defendant has not been sentenced to death, one additional work-unit shall be added for each additional 500 pages of court transcript.

c. in cases in which the defendant has been sentenced to death, the preparation of the brief shall constitute ten (10) work units and the procedures specified in subparagraphs f., g., h., and i. shall constitute ten times the work-units specified in those subparagraphs.

d. A brief involving only the validity of a guilty plea or only the propriety of a sentence in which there shall constitute one-half work unit.

e. A case which is closed by the appellate unit with the submission of neither a brief nor post-conviction motion shall constitute between one-quarter and one-half work-units, depending on the length of the record reviewed and work done on the case.

f. A case which is closed by the appellate unit after the disposition of a post-conviction motion or writ but without the submission of an appellate court brief shall constitute between one-half and one work-unit depending on the length of the record reviewed, the nature of the post-conviction hearing, and whether a trial court brief was submitted.

g. A case in which an evidentiary post-conviction hearing is conducted by the appellate unit and in which an appellate court brief is submitted shall constitute between one and one-half to two work-units.

h. The preparation of a reply brief or a petition for review or certiorari in a state court shall be to one-quarter work-units. A petition for a writ of certiorari filed in the Supreme Court of the United States shall be one-half work-unit.

Resolution

The ACCD recommends that public defender and assigned counsel caseloads not exceed the NAC recommended levels of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year. These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified. If a defender or assigned counsel is carrying a mixed caseload which includes cases from more than one category of cases, these standards should be applied proportionally. (For example, under the NAC standards a lawyer who has 75 felony cases should not be assigned more than 100 juvenile cases and ought to receive no additional assignments.)

In public defense systems in which attorneys are assigned to represent groups of clients at court calendars in addition to individual case assignments, consideration should be given to adjusting the NAC standards appropriately, recognizing that preparing for and appearing at such calendars requires additional attorney time. In assigned counsel systems in which the lawyers also maintain private, retained practices, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

The ACCD recommends that defenders, contract and assigned counsel, and bar association leaders in each state review local practice conditions and consider developing standards that adjust attorney caseloads when the types and nature of the cases handled warrant it. The increased complexity of practice in many areas will require lower caseload ceilings. The ACCD recommends that each jurisdiction develop caseload standards for practice areas that have expanded or emerged since 1973 and for ones that develop because of new legislation. Case weighting studies must be implemented in a manner which is consistent with accepted performance standards and not simply institutionalize existing substandard practices.

For sexually violent offender commitment cases that often require extensive depositions and pretrial hearings with expert witnesses, review of thousands of pages of discovery, and lengthy trials, a lawyer may reasonably handle only a small number of such cases per year. Similarly, lawyers' workloads should be limited when they are assigned persistent offender cases which, by their nature, require particularly intensive pretrial preparation and time-consuming investigation.

Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards. This should specifically include the ability of counsel to devote full time effort to the case as circumstances will require. Counsel must not be assigned new case assignments that will interfere with this ability after accepting a capital case. See ABA

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised 2004), Guideline 6.1 and 10.3. Presumptively, there should be at least two counsel on the capital defense team.^[3]

One system that can be utilized to arrive at an appropriate reduced maximum limit for complex cases is a case credit system that allocates multiple credits for specific types of cases and that recognizes that lawyers can handle fewer of those cases per year.

[1] Courts have been increasingly receptive to challenges to excessive caseloads as a cause of ineffective assistance of counsel, and have relied on caseload standards. In the settlement order in *Best v. Grant County*, a Washington case that led to a change in the felony public defense system and the implementation of standards, the County agreed to caseload limits and workload adjustments for complex cases. .
<http://www.defender.org/files/GrantCountyLitigationSettlementAgreement.pdf>

[2] King County, Washington, has developed such a system for its non-profit defender organizations. The budget is based on caseload standards per attorney, with, for example, 150 felony case credits per attorney per year. Multiple credits are provided, for example, for homicide and persistent offender ("three strikes") cases.

[3] Jurisdictions that already have established capital caseload limits include Washington (one open), and Indiana (one capital case plus no more than 20 open felony cases).

ⁱ Traffic misdemeanors punishable by incarceration should be included in the misdemeanor case limit number; traffic misdemeanors not punishable by incarceration would not be counted.